NO. 135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM V. GRIFFIN AND HUGH WILLIAM PURVIS, RECEIVERS FOR GEORGIA & FLORIDA RAILROAD.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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Alfred W. Jones, Receiver, succeeding William V. Griffin and Hugh William Purvis, Receivers, for Georgia & Florida Railroad, prays that the petition of the Solicitor General, on behalf of the defendant United States, in No. 135, October Term, 1948, to review the judgment of the United States Court of Claims, entered on April 5, 1948, in the case then entitled "William V. Griffin and Hugh William Purvis, Receivers for Georgia & Florida Railroad v. The United States," be denied.

court are so at variance with the evidence as to constitute an error of law, which ought to be reviewed." *The petitioner-defendant employs this same statement in its "Statement"*.

Passing by the question as to whether the petitioner's strategy complies properly with the letter and spirit of the court rules which seem to contemplate that each question for consideration should be brought forward specifically by an appropriate specification of error, the respondent respectfully submits that the petitioner's apparent charge that the judgment is at variance with the evidence is not justified. To demonstrate that proposition beyond any doubt, the following detailed analysis of each proposition which petitioner asserts is presented:

PROPOSITION 1: That the Court below held that fair and reasonable rates must be determined by application of a particular formula which compelled compensation for abnormal amounts of unused space not devoted to the transportation of the mail (p. 29).

The respondent respectfully submits that the lower court said no such thing. What the court really said was:

> "What we do find is that, on the facts as found and stated by the Commission, there is an erroneous conclusion of law by the Commission that plaintiffs have been fairly and reasonably compensated for their mail service.
>
> The so-called "computed" cost being the only cost that can be used, it must be fairly and reasonably computed. To what extent it approaches a fair and reasonable cost not in excess of actual cost is a matter not yet within the ability of the Commission to determine. It is a question that must be answered by good judgment, by those peculiarly fitted and equipped to ascertain the requisite facts as to such cost and exercise that judgment. Congress has chosen the Interstate Commerce Commission to perform that function, and it has done so.

As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, unpaid through failure of the Commission, because of an error of law, to order payment thereof.

Under finding 16 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.4% in order to secure for itself, under Plan 2 adopted by the Commission, a return of 5.75% thereto fore fixed by the Commission, on its investments in road and equipment engaged in mail traffic. This determination was based on the calendar year 1931 test period. The Commission's findings were determined upon an apportionment of passenger equipment used for mail traffic on the basis of space hired or required for carrying the mail.

Railroad expenses are not generally applicable as direct costs but require apportionments. The Commission did not, under Plan 2, which it adopted and which we must accept, determine actual costs of various operations." (R. 43.)

In view of the record presented the basis employed by the Interstate Commerce Commission, that is to say, Plan No. 2, appears to be fair and reasonable. The studies made are in no wise shown to be out of line with the then state of the art, science, or profession of statistical analyses and cost accounting.

The deficit found in plaintiffs' mail operations was ascertained according to the formula suggested by the Government and used by the Commission to prescribe rates for general application. As we have pointed out, the ascertainment of fair and reasonable compensation must proceed from a fair and reasonable basis." (R. 46.)

PROPOSITION 2: That the lower court "Erroneously assumes that the Commission had adopted Plan 2 as the proper method of determining mail cost and investment"—but the Commission had clearly rejected Plan 2 as a single criterion for determining compensation. (p. 27.)

The respondent respectfully submits that the lower court made no such assumption. Its findings, and its opinion, show clearly that it clearly understood the nature of Plan 2 as a part of the cost study; and also that they knew full well that the Commission had rejected the result of the cost study, as well as the reasons why the Commission did so. All that is fully evident both in the very careful and comprehensive findings of fact, and in the following quotation from the Court's opinion in the light of those factual findings:

> "The Commission's decision of May 19, 1933, 192 I. C. C. 773, states its position with reference to plaintiff's claim as follows:
>
> "The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See Railway Mail Pay, supra. The comparison of mail revenue with other revenue received for services in passenger train operations shows that mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant point out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand many are in much the same situation as the applicant in respect of passenger train operations. The data submitted fails to justify giving the applicant rates higher than those now paid other railway common carriers for like service."

"We quote rather than paraphrase this, for what it says is important. We are of the opinion that the "'approximation'' should be given greater weight than the Commission affords it, because, as we have said, and the Commission in effect admits, there is no such thing as certainty in actual cost. 'Approximate,' or as it is called "computed" cost must be relied upon, and as a matter of law must be decisive. There is no alternative, at least no satisfying alternative. Of course, there were other methods of computing cost, but the Commission, put to the choice, selected Plan No. 2. And it did not, in the decision of May 10, 1933, abandon Plan No. 2 and select another.

"The fact that the plaintiff's railroad "receives the same rates as those received by other roads for the same kind of service" is not responsive to the plea that those rates, as to the plaintiffs, are confiscatory. The service is compulsory, economy and efficiency of operation are undisputed. This is not a case where the carrier may cut down its expenses and thus convert the remuneration into one that is fair and reasonable. It has already reached the efficient and economical stage, and if it must carry the mail, the remuneration must fit that situation. Here it has not done so.'" (R. 46).

PROPOSITION 3: That the Commission had pointed out that the results of the cost study was not an accurate ascertainment of the actual costs of service, but was merely an approximation to be given such weight as seems proper in view of all the circumstances. (p. 27)

The respondent again respectfully submits that the special findings of fact well show that the lower court fully and correctly understood the nature of the cost study. The court discussed this proposition very clearly, and in its opinion, among other things, said:

"A deficit in net railway operating income from the carrying of the mail is, on its face, confiscatory. That must be conceded. It is a simple proposition that needs

no support and must be accepted as obiter. But, if we correctly read the decision of the Commission in the plaintiffs' case, reported in 192 I. C. C. 779, supra, the Commission's position is that the deficit of $1,[illegible] is a 'computed' deficit, not necessarily an actual deficit, and therefore not to be taken as 'confiscatory', although the Commission does not use that term.

The trouble with this argument is that a deficit in net railway operating income from mail is always necessarily 'computed.' Actual loss or actual deficit in such income is an ignis fatuus. This must be so until the method of arriving at a deficit receives authoritative if not common acceptation. The Postmaster General himself proposed three alternative plans, which itself indicates lack of an absolute rule. (R. 42)

. . . . . .

At a hearing on this case by a commissioner of this court February 18, 1946, a witness for the defendant, the Chief of Section, Cost Section of the Bureau of Transport Economics and Statistics, who was acknowledged in Senate Document No. 63 as especially contributing in the preparation of the cost study, stated, in response to a direct question as to whether the present cost formulae were much better than the cost formulae used by the Commission in 1928 or 1931:

> 'Well, in 1928 and 1931 the Commission did not have really any cost formulae. They still haven't got any cost formulae, but the Cost Section was formulated to the express purpose of determining cost formulae for that they might be used by the Commission in gathering costs and might be distributed to the carriers so they would have means and procedures for gathering those costs.

We thus see that ascertainment of 'actual' as applied to plaintiffs' cost in the transportation of the mail, had no prospect of realization. The cost had to be a 'computed' cost in any event. But had we the actual cost it would serve only as a guide, a cost to be considered, but not necessarily to govern, in arriving at fair and reasonable compensation. The question is, rather: What is the fair and reasonable cost? For we cannot

The Respondent-Plaintiff respectfully submits however this question has already heretofore been passed upon by this court, so that the real question raised by the petition, would be better stated as follows:

Did this court err when it upheld the contention of the petitioner in *U. S. v. Griffin* (303 U. S. 226) that the respondent's claim presented a judicial question of just compensation under the Fifth Amendment which the Court of Claims had jurisdiction to entertain and decide?

SUMMARY OF REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

(1) The petitioner-defendant's argument in support of its Reason 1, contrary to its previous contention in *U. S. v. Griffin, supra*, is that, in determining the compensation for carrying the mails the Commission is doing nothing more than fixing common carrier charges for the ordinary transportation of freight and passengers, rests upon a fundamentally erroneous conception.

One has but to read the Mail Pay Act, particularly section 541 of Title 39 U. S. Code, to see that as pointed out by the Supreme Court in its decision involving the same Commission order (*U. S. v. Griffin*, 303 U. S. 226), the carriage of the mails is compulsory taking of private property and devoting it to public use. It was for that reason that this Court when it had before it the same Commission order that is involved in this proceeding, specifically stated that "If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress," and went on to point out that railway mail service is compulsory, and if the Commission made an order for compensation which was confiscatory the Court of Claims would have jurisdiction.

The petitioner-defendant's argument is that this Court misconstrued the import of the cases which were cited in its opinion in the *Griffin* case, and that this Court intended only to say that the Court of Claims would have jurisdiction only if the Post Office Department failed to pay the full amount of compensation found to be due by the Interstate Commerce Commission in its order. The respondent-plaintiff respectfully submits that it is obvious that this Court never intended that the Court of Claims' jurisdiction should be so narrow. What it really held was that the Court of Claims had the power to determine whether the final order of the Commission fixing compensation for the taking carried out an appropriate finding of the Commission which would fix adequate compensation for the taking; and, in a second type of situation, whether the final order was adequate to avoid confiscation. Incidentally, it may be parenthetically remarked the petitioner-defendant takes an inconsistent position when it argues on the one hand, in support of its Reason 1 (p. 22) that the jurisdiction of the Court of Claims should be denied, because district courts under their general jurisdictional powers could still review railway mail pay orders and, on the other hand, in its support of it Reason 3 (p. 25) it seems to contend that no court has or should have the power of review of a mail pay order of the Commission.

(2) The petitioner-defendant argues that the carrier in this case did not exhaust the administrative remedies before resorting to the courts, arguing that the Post Master General is authorized to make special contracts where, in his judgment, the conditions warrant the application of higher rates, but, while it is true that administrative remedies must be exhausted, this is not the type of a case which falls within the definition of administrative remedy. A special contract might be entered into in order to avoid having to go to the I. C. C. in the first place, but it is not a remedy to be resorted to between the time when a Commission order is handed down and the time of taking an ap-

peal to a court for a review of that decision. It is also true that one is not required to do a useless act and when it is obvious from the written and spoken statements by the representatives of the Post Office Department that that department would entertain no thought of an increase in compensation for carrying the mail, it would be but an idle gesture to formally ask the Post Master General for a special contract.

(3) The petitioner-defendant argues that even if the Court of Claims has any jurisdiction at all, the range of that jurisdiction to review is very narrow because the Commission's judgment should not be disturbed because it is in a field peculiarly within the Commission's discretion, because of its presumed expertness.

That argument rests upon the same erroneous concept as the petitioner-defendant's argument in its Reason 1, viz., that what is involved is only a legislative rate making power, whereas the real issue is one of just compensation for a compulsory taking of private property and services for public use.

In any event, the courts always have jurisdiction to determine whether there has been confiscation, and where it comes to taking of property for public use the question of confiscation is always present and the courts have jurisdiction to determine whether the compensation fixed meets the requirements of the Constitution. The Court of Claims in particular is constantly called upon to determine the adequacy of compensation in order to avoid confiscation, whereas the issue of confiscation is not the issue which is initially involved in the legislative fixing of rates.

(4) The petitioner-defendant's argument in support of its Reason 4 seems to charge, in an oblique manner, that the findings and judgment of the lower court was contrary to the evidence.

The respondent-plaintiff respectfully submits that in the absence of specifications of error to any of the lower

court's findings of fact, the petitioner-defendant's assertions attacking the correctness of the court's conclusions are not entitled to serious consideration. Nevertheless, the petitioner-defendant's propositions, with an opening assertion that the lower court held that mail pay compensation must be determined by a particular formula which compelled abnormal amounts of unused space not devoted to transportation of the mail, if not refuted might possibly influence the court to grant a writ to look into those contentions. Hence, as a timely precaution, to save this court from the possibility of a greater burden later, each of the petitioner-defendant's propositions are examined hereinafter, beginning at page 17 and running to page 36. *However, the respondent-plaintiff does not ask the court to read that expose unless it should be curious as to the merits.*

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

The fact that the petitioner-defendant's statement of the "Questions Presented" (p. 2) and its "Specification of Errors to be Urged" (p. 5) are not clearly matched with each other; and matters of argument are repetitively scattered throughout its "Statement" (p. 3), and in its "Reasons for Granting the Writ" (p. 17); and that there is no separate summary to "exhibit clearly the points of fact and of law being presented" makes for confusion, but respondent will endeavor to resolve that confusion by ignoring the many errors of omission and commission elsewhere in the petition, and address its arguments herein to a refutation of the propositions asserted in the petitioner's "Reasons for Granting the Writ", and on the assumption that in that part of its petition is included all the points and arguments upon which petitioner really thinks it can rely.

As to the Petitioner-Defendant's Preface (p. 17).

The petitioner prefaces its four numbered reasons with the statement that this case presents the questions as to whether orders of the Interstate Commerce Commission fixing rates of compensation at which common carriers by rail shall carry the mail are reviewable in the Court of Claims, if at all; and, surprisingly enough, asserts that this question has not heretofore been presented to this court (p. 17). To the contrary however the respondent respectfully submits that this question has heretofore been presented to, and passed upon, by this court in this same cause of action between the same parties in *U. S.* v. *Griffin*, 303 U. S. 226.

As to Petitioner-Defendant's Reason No. 1 (p. 17).

In its Reason 1, the petitioner-defendant argues that the Court of Claims erred in accepting jurisdiction because, it contends, the proceeding was one for the review of legislative rate making.

That contention necessarily involves the proposition that this Court erred in previously holding in *U. S.* v. *Griffin*, 303 U. S. 226, that the issue was one of just compensation for a compulsory taking; and that there is nothing now left of both the doctrines of res judicata and stare decisis.

When the same cause of action was before this Court in *U. S.* v. *Griffin*, 303 U. S. 226, the petitioner-defendant contended, and was upheld in its position by this Court, that the issue involved the judicial question of just compensation, hence was not a review of legislative rate making within the jurisdiction of a three judge district court under the Urgent Deficiencies Act.

The petitioner-defendant advances no logical reasoning to support the proposition that rates for mail pay compensation come within the category of legislative rate regulation; and none of the cases cited by the petitioner are in point because they relate to legislative rate making only. The petitioner-defendant cites no authority whatever for

its theory that the proceedings before the Court of Claims was one for the review of legislative rate making and not one for the judicial determination of the just compensation required by the constitution. In any event, the respondent plaintiff respectfully submits that merely because the Congress selected the Interstate Commerce Commission as the medium for determining the basis and measure of the prices for the units at which should be reckoned the amounts necessary to pay just compensation for the taking of property by the Government, and the term employed to designate such prices is the word "rates"; and that those from whom the use of property are taken are common carriers, in no way changes the fact that the use of the property and service was compelled under statutory authority subject to a constitutional duty to pay just compensation.

The petitioner's theory is squarely in conflict with what this court expressly declared in *U. S.* v. *New York Central*, 279 U. S. 76, 78, where it was said:

> "The question is one of construction which requires consideration not of a few words only, but of the whole act of Congress concerned. This is the Act of July 28, 1916, chap. 261, §5, 39 Stat. at L. 412, 425-431 (U. S. C. Title 35, Chap. 15, where the long §5 is broken up into smaller sections) which made a great change in the relations between the railroads and the government. Before that time the carriage of the mails by the railroads had been regarded as voluntary (*New York, N. H. & H. R. Co.* v. *United States*, 251 U. S. 123, 127, 64 L. ed. 182, 193, 40 Sup. Ct. Rep. 67); now the service is required (U. S. C. title 39, §541); refusal is punished by a fine of $1,000 a day (U. S. C. title 39, §563), and the nature of the services to be rendered is described by the statute in great detail. Naturally, to save its constitutionality there is coupled with the requirement to transport, a provision that the railroads shall receive reasonable compensation".

It seems to the respondent that the lower court was entirely sound when it said:

"The duty of the Commission extended beyond that of establishing rates. The statute went further and required the Commission to fix fair and reasonable compensation to the individual carrier. It had to be the *individual* carrier, for otherwise the term "compensation" is meaningless. Only in the event that they were "just and equitable" could the Commission fix general rates applicable to all carriers in the same classification'. 39 Stat. 412, 430. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit." (R. 48).

The lower court also well said in the course of its opinion that:

"In *New York Central Railroad Co. v. United States*, 65 C. Cls. 115, affirmed on Appeal, 279 U. S. 73, which was a suit for mail pay as fixed by the Interstate Commerce Commission from the date of filing of application with that Commission for readjustment of compensation, this court took jurisdiction because the carrier was 'asserting a claim founded upon a law of Congress'. The Act of July 28, 1916, 39 Stat. 412, was involved as here. But with reference to the power and jurisdiction of the Commission this court said: 'Congress 'erected a tribunal or accepted one already in existence to discharge a duty which was judicial in its nature, the ascertainment of reasonable compensation to carriers for services exacted by statute,' citing *Monongahela Navigation Co., v. United States*, 148 U. S. 312, 327, to the effect that when a taking has been ordered, then the question of compensation is judicial." (R. 41.)

As to Petitioner-Defendant's Reason 2 (p. 23).

The petitioner-defendant argues that the court below "in accepting jurisdiction, also failed to follow the well established doctrine that administrative remedies must be exhausted before resort can be had to the courts" (p. 23).

The petitioner-defendant's contention would certainly have been more interesting had some authorities been cited

to support the argument that a mere authorization to an executive official to enter into a special contract was an administrative remedy within the rule, when an express remedy was coincidently prescribed in the same law.[9]

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[9] The rule itself is, of course, well known, and is analagous to the rule in equity that jurisdiction will not be taken unless there is no adequate remedy at law. To this effect, in a note in 51 Harvard Law Review, 1251, 1264 on "primary jurisdiction effect of administrative remedies on the jurisdiction of the courts" it is said, among other things, that:

> "Similarly application to the Commission will not be required unless the administrative remedy is adequate; the Commission must have the power to conduct a hearing under reasonable procedural standards".
>
> *Kansas City So. Ry.* v. *Ogden Lever District*, 15 Fed. 2, 637.
> *Munn* v. *Des Moines Nat. Bank*, 18 Fed. 2, 269.
> *Yakima Valley Bank & Trusts* v. *Yakima County*, 149 Wash. 552, 271 Pac. 280.
> *Railroad Commission* v. *Duluth Street Railway*, 273 U. S. 625, 628, 71 L. ed. 807, 810, in which the analagous rule that state remedies must first be exhausted was invoked, this Court said:
>
> "But as against these considerations it must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where, as here, a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the state court, when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the district court of the United States: *Pacific Teleph. & Teleg. Co.* v. *Kuykendall*, 265 U. S. 196, 68 L. ed. 975, 44 Sup. Ct. Rep. 553; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 67 L. ed. 659, 43 Sup. Ct. Rep. 353."

Furthermore, the rule is also essentially one of comity, and sound judicial discretion, otherwise known as the rule of "primary jurisdiction" whereby in those situations where a legislative agency has been charged with the duty of applying a remedy the courts will usually require that recourse to that remedy be exhausted as a prerequisite to the exercise of judicial jurisdiction. On this point, in an article in 27 Columbia Law Review 450, on "The

Whether or not the plaintiffs did or did not ask the Post Master General for a special contract is not a matter of definite record (R. 134). The only witness who referred to the possibility of a special contract was General Superintendent Hardy, who did not take that office until 1920 (R. 129); and the most he could say was that, *so far as he knew*, the plaintiffs had never applied to the Post Master General for a special contract (R. 101), but that he did not know that the plaintiffs had never done so (R. 101, 134).

Furthermore, the witness admitted that special contracts had been made in only a very limited number of instances under special circumstances (R. 102, 125); and it was and is a matter of common knowledge that the Post Office Department employed special contracts only under "very extraordinary conditions" (Pl. Ex. 26, R. 155, 157); and it was its policy to "keep away from the special contracts all we can". (R. 161).

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necessity of exhausting administrative remedies before resorting to judicial review, the author states:

> "*Excuse of condition*—In the absence of a statutory mandate it is within the sound discretion of the court to decide whether the particular case is an appropriate one for requiring prior resort. *U. S. v. Abilene & S. R. Co.*, 265 U. S. 274."

* * * * *

In a note in 27 Columbia Law Review 454, on this topic the author says:

> "Where the futility of further reliance on administrative machinery is due to the fact that the time for resorting to it has expired, a situation is presented which illustrates the extent to which the application of the maxim in any case is discretionary with the courts" (citing *Prentice v. A. C. L.*, 211 U. S. 210). "Where the case for inadequacy approaches certainty, however, judicial relief has been granted" (citing *Union Pacific v. Wald County*, 247 U. S. 282; *Proctor & Gamble v. Sherman*, 2 Fed. 2nd 165). (*H. Kramgold & Sons v. Jersey City*, 130 Atlantic 653; *Losick v. Binda*, 127 Atlantic 619; *Prendergast v. N. Y. Teleph. Co.*, 262 U. S. 43; *B. & O. v. P. R. C.*, 196 Fed. 690; and *Smith v. Ill. Bell Tel. Co.*, 270 U. S. 587.)"

The situation in this case was as follows:

(a) The authority granted the Post Master General rests wholly within his sole discretion; and it did not purport any correlative right in, and laid no duty upon, the carrier.

(b) The same Act provides in detail an express remedy by procedure before the Interstate Commerce Commission; which did not require, or even contemplate, either as a part thereof, or as a pre-requisite thereto, that there must first have been a request by the carrier on the Post Master General for a special contract.

(c) Even if the authority given by the law to the Post Master General to make special contracts could possibly be construed as giving a carrier an enforceable remedy, there is no rule which requires a carrier to seek that remedy before it pursues the remedy expressly provided by the law.

(d) The authority for the Post Master General to enter into a special contract necessarily speaks for the future, and not for the past, hence a special contract could not be a remedy for any of the period prior to the decision of the Supreme Court on February 28, 1938.

(e) There is no claim that the Post Office Department, well knowing that the carrier was in need and justly seeking relief, ever made any offer of a special contract. Indeed, to the contrary, the record shows that it was firmly determined not to make any concession whatever (Trans. in 63 (1937) side folio pages 142, 143, and Pl. Ex. 3, R. 140).

In any event the facts and circumstances show clearly that an application to the Post Master General was, or would have been, vain and futile; and the law does not require a vain thing.

As to Petitioner-Defendant's Reason 3 (p. 24).

The petitioner's argument seems to be that if this court does not now decide that it was mistaken in holding in *U. S. v. Griffin*, 303 U. S. 226, and now holds again that the Court

of Claims had jurisdiction, nevertheless the Court of Claims erred anyhow in disturbing rates fixed by the Commission, because the petitioner still insists that this case is one for the review of legislative rate fixing for common carriers.

The respondent respectfully submits that the petitioner's argument and cases cited are not in point for the simple elementary reason that this case is one for the judicial determination of just compensation required by the constitution, and is not one for the review of legislative rate making.

Furthermore, even if the cases cited by the petitioner for the proposition that the Court should not disturb the conclusions of a legislative agent were applicable here, that doctrine, as the cases cited themselves show, is limited to those conclusions of a legislative agent which "as applied to the facts before it and viewed in its entirety, produces no arbitrary result" (*Fed. Power Comm. v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 576).

That the Commission's order in this case was applied to the facts before it and viewed in its entirety produces an arbitrary result is clearly evident in the unanimous view of four able judges in the court below (R. 12, 36, 48), as well as by the unanimous opinions of two able federal district court judges, and one judge of the United States Court of Appeals, sitting as a three judge district court on two occasions (Trans. in 63 (1937) folio 29, 55).

As to Petitioner-Defendant's Reason 4 (p. 27).

In its argument in support of reason 4, the petitioner does not clearly relate its "Reasons" to "Question 4" or to any "Specification of Error," but engages in a critical discussion of many evidentiary details. The purpose of the petitioner's argument for its reason 4 seems to be (*without assuming a single specification of error to any of the findings of fact by the lower court*) to try to argue this court into the impression that the findings of fact by the lower

to a mandatory "inclusion of such cost" being required by the reviewing court. The respondent finds no language in the decision of the Lower Court which seems to justify the petitioner's contention. To the contrary, it said:

> "The so called 'computed' cost being the only cost that can be used, it must be fairly and reasonably computed. To what extent it approaches a fair and reasonable cost not in excess of actual cost is a matter not yet within the ability of the Commission to determine. It is a question that must be answered by good judgment, by those peculiarly fitted and equipped to ascertain the requisite facts as to such cost and exercise that judgment. Congress has chosen the Interstate Commerce Commission to perform that function, and it has done so.
>
> As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, unpaid through failure of the Commission, because of an error of law, to order payment thereof.
>
> Under Finding 46 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.4% in order to secure for itself, under Plan 2 adopted by the Commission, a return of 5.75% theretofore fixed by the Commission, on its investments in road and equipment engaged in mail traffic. (R. 43, 44.)
>
> . . . . . .
>
> The required increase of $31,227 in mail revenue is, as found by the Commission, 87.4% of the actual gross mail revenue received during 1931 ($31,227 ÷ 35,728 = 87.4%)." (R. 45.)
>
> . . . . . .
>
> "In view of the record presented the basis employed by the Interstate Commerce Commission, that is to say Plan No. 2, appears to be fair and reasonable. The studies made are in no wise shown to be out of line with the then state of the art, science, or profession of statistical analyses and cost accounting.
>
> The deficit found in plaintiffs' mail operations was ascertained according to the formula suggested by the

Government and used by the Commission in prescribing rates for general application. As we have pointed out, the ascertainment of fair and reasonable compensation must proceed from a fair and reasonable basis. The Commission, has, by its use of Plan No. 2, undertaken to do a fair and reasonable basis. And out of that basis there has been ascertained, by formulae prescribed by the Commission, what is the fair and reasonable compensation for plaintiffs' carriage of the mails beginning the first of April, 1931, and ending at the close of February, 1938. Fair and reasonable compensation cannot be both a deficit and the amount of $180,707,06 so found. It is, we conclude, the latter. (R. 45, 46.)

. . . . . .

The duty of the Commission extended beyond that of establishing rates. The statute went further and required the Commission to fix fair and reasonable compensation to the individual carrier. It had to be the individual carrier, for otherwise the term "compensation" is meaningless. Only in the event that they were "just and equitable" could the Commission "fix general rates applicable to all carriers in the same classification". 39 Stat. 412, 420. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit.

The rates authorized by the Commission were based on a grouping together and then given particular application without change. It did not follow that rates, fair and reasonable for an average road (which in fact did not exist), would be fair and reasonable for all existing roads. The statute required more than mere rates, it required fair and reasonable compensation, and the duty of fixing upon and authorizing payment of fair and reasonable compensation in any particular case could not be avoided because of the magnitude of the task, or because some other methods of calculation, which, although neither approved nor adopted, might possibly give other results.

"There is no presumption that the average is true of the particular. The presumption is otherwise, and the plaintiffs, having shown their railroad to be in a comparatively low scale, and thus distant from the aver-

ages, had no great burden of proof to bear there in presenting their case to the Commission. It was for the Commission to demonstrate that the general rules prescribed gave the plaintiffs a fair and reasonable return. This the Commission failed to do. More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances proved that plaintiffs have been underpaid $186,707.96 in fair and reasonable compensation for the period in question. (See Finding 23.)

"If that which the Commission determined is fair and reasonable compensation for the representative road, it must, we think, be fair and reasonable for any road that is so represented. The reasons given by the Commission for not ordering payment, on the basis of its findings, of the annual sums making up the above total of $186,707.96, are not convincing or even persuasive. In our opinion they all overlook the statutory mandate that the compensation to be allowed for carrying the mails must be reasonable, and the constitutional one that it must be just." (R. 48.)

CONCLUSION.

(1) The petitioner's argumentative representations in its "Statement" and in its "Reasons Why The Writ Should Be Granted" of numerous alleged points of evidentiary detail are incorrect and misleading, and is refuted by the record.

(2) The decision of the lower court is entirely consonant with the findings of fact, and the findings of fact are entirely consonant with the evidence, as is evident from the fact that the petitioner has failed to assign a single direct specification of error to any one of the numerous express findings of fact upon which rests the decision of the lower court.

(3) The petitioner's contention, as a proposition of law, that the cause of action was one for the review of legislative rate making, and the lower court lacked jurisdiction is in direct conflict with the decisions of this Court in *U. S. v. New York Central*, 271 U. S. 76, and in *U. S. v. Griffin*, 303 U. S. 226; and is in contradiction of its own previous posi-

tion, and is contrary to the principle of res judicata, since the point was expressly settled in the latter case between the same parties on the same cause of action.

(4) The law of the case has already been clearly settled in *United States* v. *Griffin*, 303 U. S. 226, and this case presents no new principle of general importance since the law is already well settled by the decisions of this Court, both in said *U. S.* v. *Griffin*, 303 U. S. 226, and in *New York Central* v. *U. S.*, 279 U. S. 76.

Wherefore the respondent respectfully submits that the petitioner has failed to make a showing which would warrant and justify this Court in granting it; hence the defendant's petition herein should be denied.

Respectfully submitted,

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Dated Washington, D. C.,
November 16, 1948.

prices [illegible] and its unreasonable cost toward a fair and reasonable compensation.

Here, however, it is found that 'there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs.''

Nowhere in the Commission's findings or conclusions in plaintiffs' case do we find even an intimation that the so-called 'actual' cost, whatever it might be, was anything but fair and reasonable. What we do find is that, on the facts as found and stated by the Commission, there is an erroneous conclusion of law by the Commission that plaintiffs have been fairly and reasonably compensated for their mail service. Cf. Chas. et al. v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106, 114, 120.'' (R. 43.)

''The so-called 'computed' cost being the only cost that can be used, it must be fairly and reasonably computed. To what extent it approaches a fair and reasonable cost not in excess of actual cost is a matter not yet with the ability of the Commission to determine. It is a question that must be answered by good judgment, by those peculiarly fitted and equipped to ascertain the requisite facts as to such cost and exercise that judgment. Congress has chosen the Interstate Commerce Commission to perform that function, and it has done so.

As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, unpaid through failure of the Commission, because of an error of law, to order payment thereof.

Under finding 16 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.4% in order to secure for itself, under Plan 2 adopted by the Commission, a return of 5.7% therefore fixed by the Commission, on its investments in road and equipment engaged in mail traffic.'' (R. 44)

PROPOSITION 4: That the Commission gave consideration to various other factors, hence the lower court's computation of rates on the Plan 2 formula was therefore not an application of the law to the findings of the Commission (pp. 27, 28).

The respondent respectfully submits that because the Commission gave controlling consideration to other factors instead of to the evidence before it, it in no way impairs the fact that it found that the results of the cost study showed the need for an increase of 37.40%.

PROPOSITION 5: That the lower court's adoption of the Commission's finding was an independent judgment that a particular formula properly measured fair and reasonable rates (p. 28).

The respondent respectfully submits that the lower court did indeed arrive at an independent judgment on the evidence before it which evidence included the Commission's findings on the result of the cost study, and also all the various factors or circumstances relied upon by the Commission and the petitioner.

PROPOSITION 6: That the cost figures were unfairly weighted against the mail traffic, and excess amounts of space "mitigated" against complete dependence on the cost formula (p. 29).

The respondent respectfully denies the correctness of any part of this proposition, and for substantiation refers to the breakdown herein following on each point relied upon by the petitioner to support said proposition 6, viz.:

As to (a): That cost figures were unfairly weighted against mail traffic, for space in the baggage car was allocated to mail traffic on the basis of the total service authorized, although the mail traffic actually used less than the authorized space (pp. 29, 31).

Also in the first paragraph, page 7, and again on pages 11 and 12, the petitioner asserts that the Commission found that "another element" of doubt as to the reliability of the space study as a basis for determining the cost of service, "arises from treating the 3 foot units of authorized mail space as the full space used by mail, regardless of the load carried:" as no physically divided space was set apart for 3 foot service, and the number of pouches carried were normally less than the maximum number of 50 to 56 pouches.

There is no merit to this contention because minimum space units are not ordered upon any theory of maximum use thereof. A three foot closed pouch unit is simply the smallest unit of space which can be authorized when any transportation service at all is requisitioned. That minimum was set by the Commission with full appreciation of the fact that in few, if any, instances would the actual service ever be exactly equal to the maximum capacity limit beyond which the Post Office Department would have to make an authorization for a larger unit of space. Nor is that condition peculiar to minimum 3 foot units. Pay for a seven foot unit is required whenever the 3 foot maximum of 56 sacks or the equivalent is exceeded, although the excess might not be more than 5 sacks, and so on up the scale. (Finding 21, R. 27.)

Furthermore, although the minimum unit is for a theoretical three linear feet of car space, much more than three linear feet of the floor space area is actually required by the nature of the service. In theory an average of as many as 56 sacks and packages, if racked up and piled six feet high, could be crammed into three linear feet, but that theory does not equate with the actualities. On a three

foot closed pouch authorization where the volume is too small to warrant a railway post office apartment with a postal clerk to handle the mail, the respondent's employees take on and put off mail sacks and packages, not only at the beginning and at the end of each trip, but also at every intermediate post office station, and care for the same in transit. Because of the necessity for this constant handling, in and out, of sacks and packages enroute the mail cannot be stacked vertically to the theoretical height of six feet, but for prompt handling must be spread out over a much greater area of floor space. That fact largely explains why the Post Office Department has always preferred to use the space authorized as being equivalent to the space used.

In any event, the proportion of 3 ft. closed pouch service to R. P. O. service is small, representing in revenue from mail service only 11.08% of the service. That fact, together with the desire for simplification for the test study purposes explains why this respondent, and carriers generally, have been willing to consider the space authorized as being equivalent to the space used.

Obviously, therefore, to the extent that the use of space authorized as the space used may represent any "element of doubt" the doubt is one which inures to the advantage of the Government, and cannot fairly be inverted as a factor to discredit the result of the cost study.

As to (b): That, although a 15 ft. apartment was authorized, respondent furnished a 30 ft. apartment, and thereby increased space charged to mail; and if that had not been done the mail traffic would have yielded a computed profit (p. 29).

This contention is fallacious and has no justification in the facts. It has heretofore been so thoroughly exploded that its present repetition is amazing in the face of plaintiff's Exhibit 21 (R. 151).

The joint study on which both the respondent and the Post Office Department have consistently relied included a

study in the field for some thirty days of the actual amount of space transported in passenger trains, and the use of that space by each respective service? That study was supervised by experts of the Post Office Department, and the record does not show that a car with a thirty foot post office apartment ever entered into that field study.

This "30-foot fallacy" was first advanced by the Commission in its second report after a second hearing when its first order had been enjoined. By that injunction the Commission had in effect been placed in an adversary position, and in its second report it strove to give all the reasons it could to seemingly justify its arbitrary action. Under these circumstances it mistakenly seized upon an almost casual statement made by Witness Fulghum for the Post Office Department in the second hearing, viz., in describing an inspection trip he had made over the line of the Georgia & Florida, some two years after the time of the cost study. Among the details recited was that, on that occasion, a 30-foot R. P. O. apartment had been furnished. Queried as to the significance of the fact he merely said that while the Post Office Department preferred to have the size it ordered, it made no objection when oversize space was furnished. That, however, was the origin of and base of the fallacy. No such contention was made by the Post Office Department whose experts know better.

Furthermore, the cost study showed that, in addition to the space actually used in the combination cars by the different services, there was more than 15 feet of waste space unused by any service. Consequently, when a car with a 30-foot R. P. O. apartment was furnished, it neither increased or decreased the amount of space counted as actually used by the Post Office Department, or of the amount of the waste space to be apportioned. Plaintiffs' Exhibit No. 21 (R. 151) demonstrates this fact both graphically and mathematically.

When this fallacy was considered by the three judge District Court, and with all the evidence before it, and after hearing argument, it said:

> "Further argument of the Commission, as we understood it, is that because 30 feet instead of 15 feet is partitioned off for mail, this adds 15 feet to the unused space for which the Post Office Department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed." (Pl. Ex. 1, p. 57).

Furthermore the District Court in its second decision quoted with approval its findings in its first decision that "There is no attack upon the efficiency of the operation of this railroad"; "There is no charge of extravagance"; and "There is no criticism of the character of the service performed in connection with transporting the mail", (Trans., p. 63 (1937) folio 103, 105).

When this contention was pressed upon the lower Court, it, in effect, rejected same in Finding 21 when it said only that:

> "The plaintiffs had acquired and operates some cars with a 30-ft. R. P. O. apartment, which at various times were furnished to the Post Office Department when a 15-foot space was ordered. In such event the postal clerks used only 15 feet of the 30-foot apartment, leaving the remainder unused, and the plaintiffs were paid on the basis of the rate for a 15-foot R. P. O. apartment" (R. 26).

As to (c): That forty-four percent of the total car space was unused (p. 29).

In making this contention the petitioner stumbled into error on its own account. It evidently labored under a misapprehension as to what the Commission meant, whereas the Commission referred only to space in combination cars, viz., the baggage car in which 3 ft. closed pouch service is rendered, and not to the total of all car space moved. The Commission did not say that 44% unused space was excessive, nor was that fact coupled with any claim that it had any real significance. The fact that the Georgia & Florida is a line of very light traffic density is simply one of the

predominant characteristics which it has in common with short lines or less than one hundred miles. Indeed, the lighter loading of passenger cars is one of the marked differences between the great "mass production" low unit cost systems like the Pennsylvania on the one hand, and the high unit cost short lines and the Georgia & Florida on the other. The Commission, for that basic reason, properly recognized this difference in prescribing higher compensation for short lines under 100 miles, but although the conditions were similar, did not do so for the Georgia & Florida Railroad, when the Post Office Department opposed it for policy reasons (Trans., p. 63, (1937). Folio 43, 44, 45, 142, 143, 144).

Furthermore, as the lower Court points out in its opinion:

> "Here, however, it is found that 'there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road, and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs." (R. 43.)

As to (d): That the Commission further pointed out that "The mail service pays considerably more for equivalent units of service than passenger proper or express (p. 30).

The respondent respectfully submits that it is not reasonable compensation when it merely yields a smaller deficit than do other branches of the service. Nor can it be said that any branch of the service is bearing its fair share of the expense of operation unless it fully pays for the cost of performing that operation. The three-judge Federal Court in its opinion of January 23, 1935, devastated petitioner's argument on this point when it said:

> "The fact that this railroad lost more money on other services rendered by it * * * does not refute or impair the fact that the compensation allowed this railroad does not equal the cost of so doing." (Trans. in 63 (1937) side Folio 58.)

Furthermore, the very object of the space study, which the Commission has always approved, was to segregate the respective passenger services into separate and distinct "compartments", so that there would be no confusion of thought to becloud the question as to what rates would be sufficient to afford just and reasonable compensation to carriers for the transportation of the mails in the authorized space units.

The Commission itself rejected the converse of this contention in the New England Mail Pay Case (85 I. C. C. 157), when the Post Office Department argued that the mail service should not pay its full proportion of the cost because those carriers were then deriving an adequate return from other passenger services.

In any event, there is no certainly reasonable compensation in a deficit, no matter how much smaller or larger than other deficits.

As to (e): That comparison of the cost of operating the space actually authorized for mail, omitting allocated unused space, with the rate paid for this space, permitted a generous return on investment (p. 30).

This is an irrelevant proposition. Furthermore, it can be asserted just as uselessly that by using one linear foot of car space per passenger, that if a train ran filled to capacity with passengers the railroad would receive 2.8903 cents per car-foot mile for the transportation of each passenger, as compared with only 1.0297 cents per mile for requisitioned mail service (Trans. in 63 (1937) folio 118, 354).

The Commission itself seemed to have previously disposed of that sort of notion when it said:

> "It is obvious that in each branch of the railroad services, whether freight, passenger, express, or mail, a certain amount of empty or unused space will be found. Many passenger seats necessarily go empty, and the baggage, mail, and express cars are not always filled to their capacity. It must be plain that the rate

> which the shipper pays for a carload must include an allowance for the cost of some empty mileage, and the price of railroad tickets must cover the cost of transporting the seats which normally go empty. Similarly, it ought not to be disputed that when the department orders or authorizes a definite amount of car space the rate to be paid therefor must cover the cost of hauling the empty space necessarily hauled to provide the service requested." (Railway Mail Pay 56 I. C. C. 41.)

As to (f): That it is significant that receipts from mail traffic, approximately $250,000 for the period 1931-1938 constituted net additions to its revenue (p. 30).

The petitioner-defendant merely tosses this assertion into this court's lap without explaining what it represented and why it should consider same significant. However, the assertion does have significance as exemplifying the generally flimsy character of the petitioner-defendant's contentions.

The petitioner's assertion is derived from its desperate contention in the court below, as set out in Finding 31 "that in an action to recover additional compensation * * * the amount of compensation should be based on 'out of pocket' costs" (R. 33). In Findings 32 and 33 the court below sets out in detail the self obvious absurdities of the petitioner-defendant's contentions of "out-of-pocket" costs, which, among other things, "takes no account of investment and contemplates no allowance of a return there on" (R. 35). The lower court said:

> "The 'out-of-pocket' or 'added' cost theory has been injected into the case (findings 31-33), but we are not convinced that additional service is in any different situation than the service to which it is an addition, as far as computing fair and reasonable compensation is here concerned. We think there is just as good reason for considering express as the added service rather than the mail. The fact that a carrier is only too glad, perhaps anxious, to carry mail to help cover otherwise wasted floor space, is understandable. But that is no

reason why the mail should be carried at 'bargain' rates. A passenger who goes aboard a train after the coach has already accumulated a paying load, must, nevertheless and rightly so, pay full fare, along with all the rest. *Ct. Fred B. Cobb Co. v. United States*, 103 C. Cls. 174, 183. We do not say that the added cost or 'out-of-pocket' theory, with its implications, is inapplicable in all cases. But the theory, if we are to believe the witnesses, has not matured into practice in the determination of mail pay." (R. 45.)

On this contention the lower court concluded:

> "We cannot agree that the basis of compensation is to be governed by the added or out-of-pocket cost theory. It was not applied in Plan No. 2, as that plan is explained to us, and we cannot find that plan grossly erroneous. The plan applied to a group gave certain rates, but the rates good for the group did not fit plaintiffs' road. The plan applied to the plaintiffs' road gave higher rates than to the average road and are the only rates presented in the Commission's decisions that give the plaintiffs fair and reasonable compensation. The plaintiffs here are entitled to them. The average road has no physical existence and the general rates put into particular effect would mean greater or less compensation for the individual carrier. But the government statute was careful to make provision whereby the rates might not be confiscatory for any one road." (R. 47.)

* * * * * * * * *

As to (g): That under the lower Court's decision the Government will be charged with paying double compensation for space which it does not use (p. 31).

This proposition thus stated is so ambiguous, if not disingenuous, that respondent is uncertain as to just what it is meant to relate. However, if the petitioner refers to the contention that it does not use all of the space it requisitions reference is respectfully made to what has already been said as to (a) on page 25 supra.

If petitioner refers to the Post Office Department's Plan No. 2 for the apportionment of unused or waste space which has been employed in all mail pay cases, reference is made to plaintiffs' Exhibit 20 (R. 145), for a description of that plan. Of it the Commission said:

> "Plan 2 recognizes that fact that an apartment is only a fraction of a car, that the operation of that fraction requires the operation of a whole car and that the operation of a whole car necessarily causes the operation of a certain amount of unused space in the remainder of the car. The *justification for apportionment some of this unused space to the service using the apartment in that the car is the unit of operation* and that the unused space outside the apartment, necessarily operated in a combination car to supply the space required for service in such cars, is due to the apartment service as much as the services in the baggage end." (R. 148).

As to (h): That it is clear that it is not legally permissible to increase the cost to the government through the use of oversized equipment (p. 31).

To that general proposition, standing by itself, the respondent takes no exception. However, there is no condition in this case to which it has any application. If the contention is that the space apportioned to the mail service in the cost study was inflated by the occasional furnishing of a 30-foot R. P. O. apartment when only a 15-foot apartment was authorized, reference is made to the complete refutation of that fallacy under the heading of (b) p. 26, supra.

As to (i) That whether or not it is permissible to include the cost of operating unused space in mail rates. It seems clear error for a reviewing court to make the inclusion of such cost mandatory (p. 32).

The respondent finds it difficult to understand, in the absence of any express specification of error to support same, just what the petitioner means, or to just what it refers, as